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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. BRETT IAN GRAY, Defendant and Appellant.	C045359 (Super. Ct. No. CM016670)

Defendant Brett Ian Gray pled guilty to inflicting corporal injury on a spouse/cohabitant (Pen. Code, § 273.5, subd. (a)). After he twice violated probation, defendant was sentenced to the upper term of four years in state prison.

On appeal, defendant contends imposition of the upper term violated the Sixth Amendment of the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 124 S.Ct. 2531]

(*Blakely*). This contention has no merit; we shall affirm the judgment.

FACTS

Incensed by a belief that his common law wife had cheated on him with another man, defendant threw her on the bed, slapped and punched her about the head, and threatened to kill her. Defendant only stopped when the couple's two small daughters jumped on his back and started hitting him.

After defendant pled guilty to inflicting corporal injury on a spouse/cohabitant, the court suspended imposition of sentence and placed appellant on four years felony probation. Defendant twice violated his probation by using controlled substances.

The presentence probation report prepared in this case, for judgment and sentence on the Penal Code section 273.5 plea, showed that defendant committed the current offense while on probation. And, while he had suffered no prior felony convictions, he had prior convictions for misdemeanor offenses: possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); possession of a switchblade (Pen. Code, § 653k); failure to appear (Pen. Code, § 853.7); and driving on a suspended license (Veh. Code, § 14601.1, subd. (a)).

After the second probation violation, the court declined to reinstate probation and sentenced defendant to the upper term of four years. In so doing, the court indicated it considered as circumstances in aggravation, the defendant's "prior performance on probation [was] unsatisfactory," "[t]he crime involved

violence . . . in the presence of children[,]" and "the victim was particularly vulnerable." In sum, the court stated, "[e]ven though Mr. Gray has a minimal record, . . . the circumstances in aggravation outweigh the circumstances in mitigation."

DISCUSSION

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435] that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. ___, ___ [159 L.Ed.2d at pp. 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence. The contention fails.

Here, the trial court relied on four aggravating factors as the basis for its decision to impose the upper term, to wit, (1) the crime involved violence; (2) the crime was committed in

the presence of children; (3) the victim was particularly vulnerable; and (4) defendant's prior performance on probation was unsatisfactory. The last factor was established by the fact that the defendant was on probation when he committed the current offense.[1] As we have noted, the rule of *Apprendi* and *Blakely* provides that the Constitution requires a jury trial on any fact that "'the law makes essential to the punishment,'" other than the fact of a defendant's prior conviction. (*Blakely, supra*, 542 U.S. at p. ___ [159 L.Ed.2d at p. 412 & fn. 5].) One valid factor in aggravation is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

Applying this standard here, we conclude that the trial court was constitutionally entitled to rely only on the fact that defendant had performed poorly on probation, by virtue of the fact he committed the instant offense while on probation, as a basis for imposing an upper-term sentence. Because defendant's poor performance on probation arises from the fact of a prior conviction and is so essentially analogous to the

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[1] The prosecution erroneously urged the judge to also consider as a circumstance in aggravation that defendant twice violated probation in the instant case. In fact, California Rules of Court, rule 4.435(b)(1) prohibits a court from considering circumstances subsequent to the grant of probation in determining the length of the sentence to be imposed after probation has been revoked. But defense counsel drew the court's attention to the error and, as the record is devoid of any suggestion the court was ignorant of the proper scope of its sentencing discretion, we presume it was not. (Evid. Code, §§ 664, 666.)

fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. (*Apprendi, supra*, 530 U.S. at p. 488 [147 L.Ed.2d at p. 453]; see also *Jones v. United States* (1999) 526 U.S. 227, 233 [143 L.Ed.2d 311, 119 S.Ct. 1215].) As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer "'does not [in any way] relate to the commission of the offense, *but goes to the punishment only* . . . .'" (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 244 [140 L.Ed.2d 350, 118 S.Ct. 1219], original italics.)

Thus, in accordance with the analysis of *Blakely*, the trial court was not required to afford defendant the right to a jury trial before relying on the fact of his poor performance on probation as an aggravating factor supporting the imposition of the upper term.

Moreover, in the plea form, defendant acknowledged that he could be sentenced to up to four years in prison. Plea bargaining is a judicially and legislatively recognized procedure (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; Pen. Code, § 1192.5) that provides reciprocal benefits to the People and the defendant. (*People v. Orin* (1975) 13 Cal.3d 937, 942.)

When, as part of a plea agreement, a defendant agrees to the maximum sentence that may be imposed, he necessarily admits that his conduct is sufficient to expose him to that punishment and reserves only the exercise of the trial court's sentencing discretion in determining whether to impose that sentence. (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181-1182.) The decisions in *Apprendi* and *Blakely* do not preclude the exercise of discretion by a sentencing court so long as the sentence imposed is within the range to which the defendant was exposed by his admissions. Such is the case here. Defendant's plea, in effect, admitted the existence of facts, which authorized the court to impose the upper term.[2]

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

I concur:

BLEASE, Acting P.J.

I concur in the result.

NICHOLSON, J.

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[2] Because we conclude here that the trial court's actions were not precluded by the holdings of *Apprendi* and *Blakely*, we do not consider here the degree to which those decisions have been affected by the United States Supreme Court's recent opinion in *United States v. Booker* (Jan. 12, 2005) ___ U.S. ___ (2005 U.S. LEXIS 628).